A **SOCIETE GENERALE CAWANGAN SINGAPURA**

v.

LEE THYE

B HIGH COURT MALAYA, KUALA LUMPUR
NALLINI PATHMANATHAN J
[SUIT NO: D-22-1049-2001]
17 NOVEMBER 2009

C ***BANKING:*** *Banks and banking business - Carrying out banking business - Whether loaning monies in Singapore to a Malaysian resident amounts to carrying out banking business within s. 4 Banking and Financial Institutions Act 1989 - Whether license required*

BANKING*: Banker and customer - Customer's mandate - Whether*
D *customer instructed drawdown of facility - Credit financing facilities granted for shares trading - Contract notes and confirmation advice notes sent to customer - No objections raised by customer - Customer estopped from disputing authorization of drawdown*

BANKING: *Securities for advances - Disposal of securities - Claim for*
E *monies owing - Whether certificate of indebtedness accurate and valid*

CIVIL PROCEDURE: *Affidavits - Certificate of exhibits - Deponent's name wrongly stated in certificate of exhibits - Inadvertent and typographical error - Defendant not prejudiced - Whether affidavit*
F *rendered defective*

CIVIL PROCEDURE: *Summary judgment - Triable issue - Banking facility - Deponent's name wrongly stated in certificate of exhibits in affidavit in support - Failure to depose that contract valid under laws of Singapore - Allegation of contravention of s. 4 Banking and Financial*
G *Institutions Act 1989 - Allegation of contravention of s. 4(1) & (2) of Exchange Control Act 1953 - Dispute as to authorization of drawdown - Dispute as to validity of certificate of indebtedness - Whether triable issues established*

H ***CONTRACT:*** *Agreement - Validity of - Establishing validity of contract under laws of Singapore - Matter of construction of contract documents*

EXCHANGE CONTROL: *Finance regulations - Banking securities - Loaning monies - Plaintiff in Singapore loaning monies to a resident of Malaysia - Whether s. 4(1) & (2) of Exchange Control Act 1953*
I *contravened*

The plaintiff was a branch of a foreign bank based in Singapore. The plaintiff granted credit financing facilities to the defendant in the sum of USD7,000,000 for the purposes of investing in shares in Bursa Saham Malaysia. The defendant executed the letter of offer together with the Standard Conditions and other documents. The plaintiff retained the right to terminate the facility at its discretion and to utilize all deposits and stocks held by the plaintiff to discharge any debt due by the defendant. The said share financing facility was utilised by the defendant, who subsequently failed to repay the sum outstanding. The plaintiff duly notified the defendant that it had breached the terms of the credit facility. Having received no response from the defendant, the plaintiff proceeded to dispose of all the securities held under the said account, thereby reducing the sum owed to US$6,624,735.67. The plaintiff sought summary judgment for a sum of US$6,624,735.67. The defendant in response raised the following 'triable' issues: (i) that the exhibit page in the affidavit in support of the application for summary judgment by Ooi Siew Peng made reference to an affidavit affirmed by one 'Dean Travis' instead of the said Ooi Siew Peng and as such the affidavit was defective; (ii) that the plaintiff failed to establish the validity of the contract under Singapore law; (iii) that there was a breach of the Banking and Financial Institution Act 1989 ('BAFIA') and s. 4 of the Exchange Control Act 1953 ('ECA'); (iv) that the plaintiff failed to provide evidence of instructions by her for drawdown under the facility; and (v) that the plaintiff failed to disclose the charged securities and the amounts recouped from a sale of the same therefore impinging on the accuracy and validity of the certificate of indebtedness. The Senior Assistant Registrar allowed the plaintiff's application for summary judgment and hence this appeal.

Held (dismissing appeal):

(1) The reference to Dean Travis rather than Ooi Siew Pheng in the certificate annexed to the exhibit in the affidavit was entirely inadvertent and typographical. It caused no prejudice to the defendant. The requirements of O. 41 r. 11(2) had been complied with substantively. Additionally, learned counsel for the plaintiff produced her copy of the affidavit in support which disclosed that the error had been corrected by the deletion of the name 'Dean Travis' on her copy and the substitution of the name 'Ooi Siew Pheng'. This did not render the affidavit defective. This was not a 'triable' issue. (para 12)

(2) The issue of whether or not there was a valid contract under the laws of Singapore was a question of construction of the relevant contract documents. The fact that the plaintiff's deponent had not stated nor made an assertion on oath that the contract was valid under the law of Singapore did not render the application for summary judgment deficient. (para 14)

(3) Section 4 of BAFIA precludes a 'person' from carrying on the business of banking unless it is a public company and holds a valid licence granted under s. 6(4) to carry on such business. The plaintiff could not be said to be carrying on banking business in Malaysia by loaning monies in Singapore to a Malaysian resident. Accordingly, s. 4 was inapplicable. This was not a triable issue. (para 18)

(4) Since the lending was done in Singapore, it also did not contravene s. 4(1) of the ECA. Further, the plaintiff did not borrow from or lend to a person outside Malaysia. In fact it was the plaintiff that was outside Malaysia and who loaned monies to a resident of Malaysia. Thus, there was no contravention of s. 4(2) either. This too was not a 'triable' issue. (paras 20 & 21)

(5) The defendant had written letters to the plaintiff proposing settlement and seeking indulgency after the sale of all shares held in her account and in respect of which contract notes and various other confirmation advice notes etc. had been sent to her. In the face of these documents, it did not behove the defendant to now dispute the authorization of the drawdown under the facility. She was estopped from doing so. She did not dispute the mountain of documentation issued and sent to her. This was therefore not a 'triable' issue. (para 24)

(6) The defendant was aware at all times of the state of her account and how the charged shares were disposed of to reduce the amount outstanding. As such, the validity of the certificate of indebtedness was not a 'triable' issue. (para 26)

Case(s) referred to:

Banque Nasionale De Paris v. Wuan Swee May & Anor [2000] 4 CLJ 387 HC ***(refd)***

Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC ***(refd)***

Commerzbank (South East Asia) Ltd v. Dennis Ling Li Kuang [2000] 2 CLJ 57 HC ***(refd)***

ELF Petroleum SE Asia Pte Ltd v. Winelf Petroleum Sdn Bhd [1984] 1 LNS 166 HC ***(refd)***
Keppel Finance Ltd v. Phoon Ah Lek [1993] 1 LNS 106 HC ***(refd)***
National Company for Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(refd)***

Legislation referred to:
Exchange Control Act 1953, ss. 4(1), (2), 6(4)
Rules of the High Court 1980, O. 41 r. 11(2)

For the plaintiff - Lee Ong & Kandiah; M/s CM Teng
For the defendant - Thomas Philip; M/s Kor See Yimn

Reported by Amutha Suppayah

JUDGMENT

Nallini Pathmanathan J:

[1] This is the defendant's appeal to the judge in chambers against the order of the learned Senior Assistant Registrar dated 24 June 2002 allowing the plaintiff's application for summary judgment against the defendant in the sum of USD6,624,735.67.

Salient Facts

[2] The plaintiff is a branch of a foreign bank based in Singapore. *Vide* letter dated 24 July 1995, the plaintiff granted credit financing facilities to the defendant in the sum of USD7,000,000 for the purposes of investing in shares on the then Kuala Lumpur Stock Exchange, now Bursa Saham Malaysia. It is not in dispute that the defendant executed the letter of offer dated 24 July 1995 together with the standard conditions governing share financing/trading facility. Additionally the defendant executed a 'mandate for personal accounts (by an individual), indemnity for telephone/facsimile/telex instructions, a letter of indemnity, a declaration for mail held by the bank, letter of set-off, a charge over deposit all dated 28 July 2005 and subsequently a further memorandum of deposit (first party) dated 3 October 1997.

[3] The salient terms governing the grant of the facility are to be found in the standard conditions governing share financing/trading facility. In essence in consideration of the provision of the share financing facility, the plaintiff retained the right to terminate the facility at its discretion and to claim repayment of all monies

outstanding under the facility, to levy interest at 1.25% above the plaintiffs costs of funds, to utilize all deposits and stocks held by the plaintiff to discharge any debt due by the defendant and to keep the plaintiff indemnified in respect of all costs, fees and liabilities or charges of whatsoever nature that might arise. The parties further contracted that a certificate issued by the plaintiff is final, conclusive and binding as to the quantum due and owing by the defendant to the plaintiff.

[4] The plaintiff maintains that the said share financing facility was utilised by the defendant, who subsequently failed or neglected to repay the sum outstanding. By letter dated 27 May 1998 the plaintiff notified the defendant that it had breached the terms of the credit facility and that a sum of RM26,807,692 remained outstanding. A further letter dated 10 June 1998 was also issued, but to no avail. *Vide* letter dated 7 September 1998 the plaintiff informed the defendant that in view of Bank Negara's announcement on currency control, the plaintiff would be converting the total outstanding under the credit facility from Ringgit Malaysia to US Dollars. This translated to a sum of US$6,554,034.35. Having received no response from the defendant, the plaintiff proceeded to dispose of all the securities held under the said account, thereby reducing the sum owed to US$6,624,735.67. A certificate of Indebtedness stipulating the amount outstanding is annexed as exh. 'OSP4'.

[5] In support of the contention that the facility was utilised the plaintiff relies on a letter dated 24 June 1998 from the defendant to the plaintiff in response to a letter of demand issued by the plaintiff's solicitors in Singapore. The defendant maintains *inter alia*, that she "... has been discussing various proposals for settlement with ..." the plaintiff's representatives in Singapore. She goes on to state: " ... With reference to the contents of the letters, please note that upon the payment by the interested third party for the first block of the shares in Mancon Berhad, which shall amount to approximately RM146,880,000 or thereabout; I shall immediately proceed to settle the outstanding amounts due by me to your clients ...".

[6] In a further letter dated 14 December 1998, the defendant together with two others again made reference to a settlement arrangement for monies due under, *inter alia*, her share financing account.

[7] The plaintiff has also annexed all the 'position statements' pertaining to the sale of shares held in the defendant's account and taken towards reduction of the amount outstanding, (see 'OSP3'). Additionally contract notes evidencing the sale of shares held by the plaintiff were also issued to the defendant, initially held at the bank and subsequently to the defendant's home address. Confirmation advice notes were similarly issued to the defendant. This voluminous quantity of documentation elicited no response from the defendant.

[8] On the basis of the foregoing, the plaintiff makes claim for the sum of US$6,624,735.67 together with interest.

[9] The defendant in response, raises the following 'triable' issues:

(i) The defendant maintains that the exhibit page in the affidavit in support of the application for summary judgment by Ooi Siew Peng makes reference to an affidavit affirmed by one 'Dean Travis' instead of the said Ooi Siew Peng. It is contended that the supporting affidavit is therefore defective and precludes its use in these proceedings;

(ii) The defendant maintains that the plaintiff has failed to establish that the contract is valid under Singapore law by, at the very least, an assertion to that effect in the affidavit in support of the application for summary judgment. It is further submitted that the court cannot assume the validity of the contract under Singaporean law and as such the plaintiff has failed to establish a *prima facie* case;

(iii) Illegality - It is contended that there is a breach of the Banking and Financial Institution Act 1989 ('BAFIA') as well as s. 4 of the Exchange Control Act 1953. Such matters it is contended are not suitable for disposal by way of this summary procedure;

(iv) The defendant contends that the plaintiff has failed to provide evidence of instructions by her for drawdown under the facility. This is particularly important in the face of her denial or lack of knowledge in so far as such instructions are concerned. In short, the defendant challenges the authorization for the drawdown of the facility;

(v) The plaintiff has failed to disclose the charged securities and the amounts recouped from a sale of the same, which impinges on the accuracy and validity of the certificate of indebtedness. Here it is submitted that the principle in *Cempaka Finance Bhd*

v. Ho Lai Ying & Anor [2006] 3 CLJ 544; was not intended to allow the circumvention of proof in the face of deficiencies in the plaintiffs case.

[10] I shall consider each of these issues in turn:

Issue (i): The Defective Affidavit

[11] A perusal of the affidavit in support of the application for summary judgment by Ooi Siew Pheng dated 30 July 2001 does indeed reveal that the certificate annexed to the exhibit clearly inadvertently makes reference to one Dean Travis rather than Ooi Siew Pheng. Order 41 r. 11(2) states:

> Any exhibit to an affidavit must be identified by a certificate of the person before whom the affidavit is sworn.

[12] There has indeed been compliance with O. 41 r. 11 in that the notary public, before whom the affidavit was sworn has executed the certificate identifying the exhibit. However the error there is the reference to the affidavit of 'Dean Travis' rather than Ooi Siew Pheng. It appears to this court that such an error was entirely inadvertent and typographical. It has caused no prejudice to the defendant. The requirements of O. 41 r. 11(2) have been complied with substantively. Additionally, learned counsel for the plaintiff produced her copy of the affidavit in support which disclosed that the error had been corrected by the deletion of the name 'Dean Travis' on her copy and the substitution of the name 'Ooi Siew Pheng'. In these circumstances this did not render the affidavit defective, thereby precluding it from being utilised in support of the application for summary judgment. This did not comprise a 'triable' issue.

Issue (ii): Failure To Assert That The Contract Is Valid Under Singapore Law

[13] It was submitted by learned counsel for the defendant that it was incumbent on the plaintiff to establish that the contract was valid under Singapore law at least by an assertion to that effect, which is a requirement to enable the plaintiff to seek summary judgment. This was premised on the basis that the contract documents clearly make reference to the applicability of Singapore law.

[14] First it is not a requirement or pre-requisite under the oft-cited case of *National Company for Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 that such an assertion be made if the plaintiff intends to proceed by way of an

application for summary judgment. The issue of whether or not there is a valid contract under the laws of Singapore is a question of construction of the relevant contract documents. The fact that the plaintiff's deponent has not stated nor made an assertion on oath that the contract is a valid one under the law of Singapore does not render the application for summary judgment deficient.

[15] Further and in any event the fact that the parties had contracted that the laws of Singapore were applicable to any dispute did not oust the jurisdiction of the Malaysian courts to determine the dispute, (see *ELF Petroleum SE Asia Pte Ltd v. Winelf Petroleum Sdn Bhd* [1984] 1 LNS 166.

Issue (iii): Alleged Breach Of The Provisions Of BAFIA And The Exchange Control Act 1953

[16] With respect to BAFIA, the defendant contends that the plaintiff has breached s. 4 of the Act. Section 4 provides that 'banking business' can only be conducted by a licensed institution. The defendant submits that the plaintiff had provided finance within the meaning of the definition of 'banking business' in that the defendant resides in Malaysia, the facility was for the purposes of share trading and financing, the shares were purchased on the KLSE. As such it is contended that the facility was used to finance the acquisition of shares by a Malaysian in Malaysia.

[17] Section 4 provides - No person shall carry on:

(a) banking, finance company, merchant banking, or discount house business, unless it is a public company; or

(b) money-broking business, unless it is a corporation,

and holds a valid licence granted under s. 6(4) to carry on such business.

[18] Section 4 clearly therefore precludes a 'person' from carrying on the business of banking unless it is a public company and holds a valid licence granted under s. 6(4) to carry on such business. Applied to the instant case, it follows that the plaintiff, a financial institution cannot carry on business in Malaysia unless it complies with those requirements. But the plaintiff is not carrying on banking business in Malaysia. It, a foreign finance company, has loaned monies to a Malaysian resident. It cannot be said therefore that it has carried on banking business in Malaysia by loaning monies in Singapore to a Malaysian resident. Accordingly, s. 4 is inapplicable to the facts of the instant case. This does not therefore comprise a triable issue.

[19] As for s. 4 of the Exchange Control Act 1953, it provides as follows:

> 4. Dealings in gold and foreign currency.
>
> (1) Except with the permission of the Controller, no person, other than an authorized dealer, shall, in Malaysia, buy or borrow any gold or foreign currency from, or sell or lend any gold or foreign currency to, any person other than an authorized dealer.
>
> (2) Except with the permission of the Controller, no person resident in the scheduled territories, other than an authorised dealer, shall in Malaysia, do any act which involves, is in association with, or is preparatory to, buying or borrowing any gold or foreign currency from, or selling or lending any gold or foreign currency to, any person outside Malaysia ...

[20] The defendant maintains that it has not been established that the consent of the controller was obtained and that it is incumbent on the plaintiff to show this. Additionally the plaintiff maintains hat this issue of illegality is not suitable for summary disposal. This issue has been considered in the case of *Banque Nasionale De Paris v. Wuan Swee May & Anor* [2000] 4 CLJ 387, where similarly, the 1st defendant opened an offshore account with the plaintiff and obtained a foreign currency loan facility of USD500,000 to facilitate share trading in Malaysia. The documentation relating to the loan was executed in Malaysia and security was held both in Singapore and in Malaysia. The defendants in that case contended that the enforcement of the judgment that had been obtained against them would be contrary to public policy as the loan transaction was illegal and in breach of both BAFIA as well as s. 4 of the Exchange Control Act 1953. The learned judge dealt with ss. 4(1) and (2) and relied on the case of *Keppel Finance Ltd v. Phoon Ah Lek* [1993] 1 LNS 106 where VC George J (as he then was) held *inter alia*, that s. 4(2) does not *per se* prohibit residents in Malaysia from borrowing foreign currency outside Malaysia, as (the section) is clearly restricted to acts done "in Malaysia". Similarly in the case of *Commerzbank (South East Asia) Ltd v. Dennis Ling Li Kuang* [2000] 2 CLJ 57, where the defendant had applied for credit facilities from the plaintiff in Singapore without the permission of the Controller of Foreign Exchange of Malaysia. In the instant case too, the lending was done in Singapore and does not therefore contravene s. 4(1) of the Exchange Control Act 1953.

[21] As for s. 4(2), the act complained of here is that of the plaintiff, the non-resident lender and not the act of the resident borrower. The non-resident lender is said to do an act which involves or is in association with or is preparatory to the resident

borrower borrowing foreign currency from the non-resident lender. But s. 4(2) refers to a person resident in Malaysia. The plaintiff is not resident in Malaysia. Therefore s. 4(2) is inapplicable to the plaintiff as the plaintiff is not a resident of Malaysia. Further the subsection provides that the resident is prohibited from borrowing or lending foreign currency to any person outside Malaysia. Again the plaintiff did not borrow from or lend to a person outside Malaysia. In fact it was the plaintiff that was outside Malaysia and who loaned monies to a resident of Malaysia. Accordingly there has been no contravention of s. 4(2) either. This too does not comprise a 'triable' issue.

Issue (iv) - Failure Of The Plaintiff To Produce Evidence Of Issuance Of Instructions By The Defendant For Drawdown Substantiating Utilization Of The Facility

[22] In essence the defendant maintains that in the face of her express affirmation to the effect that she cannot recall giving any instructions for drawdown either orally by telephone, or by telex of any other means, the plaintiff has failed to provide any evidence of the same. This it is contended is an issue that ought to be proved at trial. In short, the defendant challenges the plaintiff to produce proof of her authorization of the drawdown or utilization of the facility.

[23] The plaintiff has sought to do this by relying on the letter dated 24 June 1998 as well as 14 December 1998 where the defendant states expressly that she is trying to settle the amount due and owing to the plaintiff. These letters are tantamount to an admission by the defendant of the amounts due and owing by her to the plaintiff.

[24] The letters evidence the fact that the defendant did not, after the utilization of the facility seek to challenge that fact during that period. Significantly these letters were written well after the sale of all shares held in her account and in respect of which contract notes and various other confirmation advice notes etc. had been sent to her. In the face of all these documents and particularly the letter proposing settlement and seeking indulgency, it does not behove the defendant to now dispute the authorization of the drawdown under the facility. She is estopped from doing so. The fact that she did not dispute at any time during the utilization of the facility and thereafter any of the documents substantiating such use, precludes her, by estoppels from now mounting a challenge, after such a voluminous amount of documentation was issued to her. Any attempt to do so at this stage appears to be less than

bona fide. (Finally, the defendant has executed an indemnity for Telephone, facsimile and telex instructions whereby she has indemnified the employees of the plaintiff in respect of any instructions she gave). In view of her conduct as shown by her correspondence and her failure to dispute the mountain of documentation issued and sent to her, this issue does not comprise a 'triable' issue.

Issue (v): The Plaintiff Has Failed To Disclose The Amount Recouped From A Sale Of The Charged Securities Which Renders The Certificate Of Indebtedness Less Than Valid And Allows The Plaintiff To Circumvent The Burden On It To Prove Its Loss

[25] As stated above, a voluminous number of contract notes as well as 'confirmation advice' notes and statements were delivered to the defendant throughout the tenure of the facility, first to be held by the bank and subsequently to her home address. The defendant had also authorized the plaintiff to keep correspondence addressed to her at the bank for safekeeping. This is evidenced by the "declaration for Mail Held by Bank". Notwithstanding this, as stated above, a great deal of the documentation relating to the sale of shares held in her charged securities account was sent to her home address.

[26] There was no response, dispute or challenge to a single of these documents at any time until after the institution of these proceedings. In the face of this voluminous quantity of documentation which the defendant elected not to dispute, she is now estopped from claiming otherwise. The conclusion in issue (iv) above is applicable here. Consequently the defendant was aware at all times of the state of her account and how the charged shares were disposed of to reduce the amount outstanding. In these circumstances, this too cannot amount to a 'triable' issue.

[27] As no triable issues were raised, the plaintiff is entitled to summary judgment in terms of prayers 1 and 2 of encl. 4.